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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-518

HOWARD B. LEVY, PETITIONER

v.

JACOB J. PARKER, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

A prior opinion of this Court is reported at 417 U.S. 733. The opinion of the court of appeals (Pet. App. 1oa–4oa) is unreported. A previous opinion of the court of appeals is reported at 478 F. 2d 772. The opinion of the district court denying petitioner's motions for discovery (Pet. App. 5oa–22oa) is reported at 316 F. Supp. 473. The opinion of the district court denying the petition for habeas corpus (Pet. App. 23oa–29oa) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1974. The petition for a writ of certiorari

was filed on November 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is required to disclose to petitioner's civilian counsel all documents in an investigatory file on petitioner, including those documents found by the presiding law officer to be irrelevant to the case.

2. Whether petitioner's court-martial prosecution was unconstitutional because improperly or discriminatorily motivated.

3. Whether in a prosecution for making statements in violation of Articles 133 and 134 of the Uniform Code of Military Justice (prohibiting conduct "to the prejudice of good order and discipline in the armed forces" and conduct "unbecoming an officer and a gentleman"), the "truth" of the statements in question is a valid defense.

4. Whether the First Amendment bars the United States from prohibiting speech, by an officer in the armed forces, that is detrimental to order and discipline among the troops.

5. Whether the Constitution required separate trials of charges based upon speech and charges based upon conduct.

6. Whether the military justice system deprived petitioner of a fair trial under the Fifth and Sixth Amendments because it (a) allows conviction by less than unanimous vote; (b) uses fact-finders selected in part by the defendant's commander; (c) limits the number of peremptory challenges to one per side;

(d) permits challenges for cause to be determined by other court members; (e) permits the investigating officer to be appointed by the convening authority; (f) gives the prosecutor a "preferred" role; and (g) assigns important functions to the Staff Judge Advocate.

7. Whether the denial of petitioner's request for a change of venue denied him due process of law.

STATEMENT

On June 2, 1967, petitioner—then a captain in the United States Army—was convicted by a general court-martial of violations of Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933, and 934. Petitioner had entered the Army under the "Berry Plan" (see 50 U.S.C. App. 454), pursuant to which he agreed to serve for two years as a doctor if permitted first to complete his medical training. See *United States* v. *Levy*, 39 C.M.R. 672, 675. From the time he entered on active duty in July 1965 until his court martial, petitioner was assigned as chief of the dermatology service, U.S. Army Hospital, Fort Jackson, South Carolina.

1. Article 90 provides for punishment of anyone subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer." The specification under Article 90 (Charge I) alleged that petitioner willfully disobeyed a colonel's command "to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne), 8–R–F 16, Dermatology Training* * * *."

The evidence admitted under this specification showed that one of the functions of the hospital to which petitioner was assigned was to train special forces aidmen (Tr. 221–223, 232).[1] As the chief of the dermatology service (and the hospital's only trained dermatologist), petitioner had the responsibility to conduct training for those aidmen in the identification and treatment of certain skin disorders and diseases (Tr. 227–232). In the late summer of 1966 it came to the attention of Colonel Fancy, the hospital commander, that the dermatology training of the students was unsatisfactory (Tr. 222–223, 229–230). In early October 1966, following an interview with Agent James West of Military Intelligence regarding a security check of petitioner, Colonel Fancy decided to investigate the problems of the training program in greater detail (Tr. 229–231). At that time Colonel Fancy was still uncertain of the accuracy of the reports he had received indicating that the training was not being carried out (Tr. 253).

Colonel Fancy therefore investigated the training program and determined that petitioner had totally neglected his duties (Tr. 229–231). On October 11, Colonel Fancy called petitioner to his office and handed him a written order to conduct the training (Tr. 231–232). Upon reading the order, petitioner stated that he understood it, but announced that he would not obey it because of his medical ethics (Tr. 232–233, Pros. Ex. 2). Petitioner persisted in his re-

[1] "Tr." refers to the transcript of the court-martial trial, which is part of the record below.

fusal to obey the order, and later reviews of the program established that the training was still not being carried out (Tr. 239–242, 528–529, 531–532, 537, 545, Pros. Exs. 3 and 4).

2. Article 134 proscribes, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Article 133 provides for punishment of "conduct unbecoming an officer and a gentleman."

The specifications under these Articles alleged that from February 1966 to December 1966 petitioner made several public statements to enlisted personnel at the post, of which the following is representative:

> "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children." [2]

[2] The specifications under these Articles are set forth in the government's brief (pp. 8–12, n. 5) in *Parker* v. *Levy*, No. 73–206.

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The specification under Article 134 alleged that petitioner publicly uttered such statements "with design to promote disloyalty and disaffection among the troops." The specification under Article 133 alleged that, "while in the performance of his duties at the [hospital]," petitioner "wrongfully and dishonorably" made statements characterized as intemperate, defamatory, provoking, disloyal, contemptuous and disrespectful to Special Forces aidmen and other enlisted personnel.

3. After reviewing a critique of petitioner's training program, prepared in late November 1966, Colonel Fancy decided to punish petitioner nonjudicially under Article 15, 10 U.S.C. 815 (Tr. 256–267). Charges under Article 15 were drawn up and sent to the Staff Judge Advocate's Office (Tr. 258–259). Before imposing punishment, however, Colonel Fancy was advised by the intelligence office that he should read the current "G–2 dossier" [3] on petitioner, which indicated violations of Articles 133 and 134 (the "General Articles") and contained additional information about petitioner's willful refusal to obey the order. (See, *e.g.*, Pet. 17–19; Pet. App. 16a–17a.) After conferring with legal officers and reviewing the dossier, Colonel Fancy terminated the non-judicial punishment proceedings, because he had concluded that a court-martial would be more appropriate (Tr. 259–261).

4. Following his conviction petitioner was sentenced to dismissal from the service, forfeiture of all pay and

[3] The "G–2 dossier" designates a United States Army Counterintelligence Records Facility file.

allowances, and confinement for three years at hard labor. After he had exhausted his appeals within the military system,[4] petitioner filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania.[5] The petition raised a variety of issues, including the claim that Articles 133 and 134 were unconstitutionally vague. The district court denied relief, holding that these Articles are not unconstitutional for vagueness (Pet. App. 28oa). In rejecting the rest of petitioner's claims (Pet. App. 5oa–29oa), the court noted that petitioner's contentions were not supported by the record and that, in any event, the military tribunals had given "fair consideration" to them (Pet. App. 26oa). See *Burns* v. *Wilson*, 346 U.S. 137. The court of appeals reversed, holding that Articles 133 and 134 were void for vagueness. *Levy* v. *Parker*, 478 F. 2d 772 (C.A. 3). The government sought review in this Court, which upheld the Articles and remanded the case to the Third Circuit for consideration of the contentions that the court of

[4] *United States* v. *Levy*, 39 C.M.R. 672, petition for review denied, 18 U.S.C.M.A. 627. Petitioner also unsuccessfully sought relief in the civilian courts. *Levy* v. *Corcoran*, 389 F.2d 929 (C.A.D.C.), application for stay denied, 387 U.S. 915, certiorari denied, 389 U.S. 960; *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor*, Civ. No. 67–442 (D.S.C. July 5, 1967), affirmed, 384 F.2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049; *Levy* v. *Dillon*, 286 F. Supp. 593 (D. Kan.), affirmed, 415 F.2d 1263 (C.A. 10).

[5] Petitioner's confinement was due to expire on August 14, 1969. After he filed his petition for *habeas corpus*, Mr. Justice Douglas, on August 2, 1969, released him on bail (396 U.S. 1204).

appeals had not treated in its opinion. *Parker* v. *Levy, supra,* 417 U.S. 733. The Court stated (417 U.S. at 762):[6]

> To the extent that these points were properly presented to the District Court and preserved on appeal to the Court of Appeals, and to the extent that they are open on federal habeas corpus review of court-martial convictions under *Burns* v. *Wilson,* 346 U.S. 137 (1953), we believe they should be addressed by the Court of Appeals in the first instance.

In its judgment order on remand (Pet. App. 1oa–4oa) the court of appeals, after stating that it had considered petitioner's remaining contentions, affirmed the judgment of the district court.

ARGUMENT

As both the district court and the court of appeals held, the military tribunals properly considered and rejected petitioner's various claims. These findings are dispositive of the instant case under *Burns* v. *Wilson,* 346 U.S. 137, 142, which held "that when a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus] application, it is

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[6] This Court also rejected two of petitioner's claims which had been addressed by the court of appeals—that training aidmen in dermatology would have constituted participation in a war crime and that the order to conduct the training was illegal because motivated solely by a desire to increase possible punishment. The Court noted its agreement with the court of appeals that "'these factual determinations adverse to [petitioner] under an admittedly valid article are not of constitutional significance and resultantly, are beyond our scope of review.' * * * See *Whelchel* v. *McDonald,* 340 U.S. 122 (1950)." *Parker* v. *Levy, supra,* 417 U.S. at 761.

not open to a federal civil court to grant the writ simply to re-evaluate the evidence." Indeed, petitioner does not now contend that the military tribunals failed to provide full and fair review of the claims he now advances.[7] None of petitioner's claims, even if they could have been considered well-taken in the quite different context of a civilian trial, shows that his court-martial was "so conducted that it [became] bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." *Burns* v. *Wilson*, 346 U.S. at 142–143. See also *United States* v. *Augenblick*, 393 U.S. 348, 356.

1. a. Petitioner's major contention (Pet. 33–39) is that he was deprived of his Fifth and Sixth Amendment rights by the government's decision not to release to his civilian defense counsel the entire "G–2 dossier." Relying on *Brady* v. *Maryland*, 373 U.S. 83, petitioner argues that if civilian defense counsel had been granted access to the entire investigative file, he might have been able to prove that the prosecutorial decision to commence a general court-martial was based on information in the G–2 dossier that, prior to entering the Army, petitioner attended meetings of subversive organizations, and that while in service petitioner engaged in off-duty, off-base civil

[7] Petitioner argued in the district court that the standard of review stated in *Burns* v. *Wilson* was no longer applicable (Pet. App. 260a), but he has not repeated that argument in light of this Court's admonition (417 U.S. at 762) that his claims were to be evaluated under the *Burns* standards.

rights activities in a South Carolina town.[8] Support in the G–2 dossier for this contention would show, petitioner asserts, that he was punished not for violations of Articles 90, 133, and 134, but rather for constitutionally protected activities.

These contentions, and petitioner's other claims relating to discovery (Pet. 39–41), are answered in the opinions of the district court denying both petitioner's motion for production of documents (Pet. App. 5oa–22oa) and his petition for habeas corpus (Pet. App. 23oa–29oa). We rely principally on those opinions.

At the court-martial, 80 pages of the 180-page dossier were released to petitioner's civilian defense counsel, even though the dossier contained classified information. Petitioner's appointed military defense counsel, a member of the Judge Advocate General's Corps and a qualified lawyer (who, unlike petitioner and his civilian counsel, possessed the requisite security clearance), was allowed to review the entire dossier to determine whether any of the unreleased documents might be helpful to the defense (App. 354).[9] Though he was not authorized to reveal the contents of irrelevant portions of the file, the military counsel advised the civilian counsel that the undisclosed portion of the dossier was irrelevant.[10] The law officer

[8] Petitioner does not rely upon the Jencks Act, 18 U.S.C. 3500, violations of which do not normally rise to a constitu- this Court in *Parker* v. *Levy*, *supra*, No. 73–206.

[9] "App." designates the three-volume appendix filed with this Court in *Parker* v. *Levy*, *supra*, No. 73–206.

[10] Contrary to petitioner's suggestion (Pet. 17, 38 n. 1), military defense counsel was not denied access to any part of the

(the military trial judge) also reviewed the entire file *in camera* and found nothing relevant in the undisclosed portions. He later permitted the military defense counsel additional opportunity to inspect the file and request any particular document (Tr. 125–126). No such request was made.[11]

There is simply no evidence in the record that any document in the G–2 dossier would have been helpful to petitioner's defense. Petitioner's military counsel [12] and the law officer, both of whom had access to the dossier, concluded that it contained no relevant documents. The district court was therefore entitled to conclude (Pet. App. 21a):

> On the present record, there is nothing but petitioner's speculation that the dossier "might" contain something out of which he may be able to construct an argument that constitutional rights have been violated.

G–2 dossier, and he was not bound by the classified nature of the materials to withhold *relevant* information from civilian defense counsel.

Petitioner asserts (Pet. 17): "Military counsel assisting in the case was placed '* * * in a position also of a conflict * * * in that Army regulations, of course, require him to maintain the secrecy of matters in the dossier, while at the same time his duty as an attorney to his client requires a full disclosure to his client of all matters and facts that come into his possession and knowledge.' A–841."

The quoted portions of this statement are reproduced from civilian defense counsel's arguments before the law officer, and do not represent the position of the government.

[11] Civilian counsel for petitioner requested the entire file but never requested particular parts of the dossier.

[12] Petitioner did not object to the qualifications of his appointed military counsel or request different counsel.

That sort of speculation is insufficient to allow petitioner to "rummage in government files." *Taglianetti* v. *United States*, 394 U.S. 316, 317. The government is not constitutionally required to make information in its possession available to a defendant unless that information might help exculpate him (*Brady* v. *Maryland*, *supra*), and that standard is not met here.[13]

There is no reason for this Court to defer disposition of this case pending decision in *McLucas* v. *DeChamplain*, No. 73-1346, argued December 9, 1974, which presents the question whether the federal "district court properly invalidate[d] restrictions on access to and use of classified documents by the accused serviceman's civilian counsel." (Government Br. 2.) Petitioner's argument that there is a significant similarity between this case and *DeChamplain* would seem to be based primarily on the fact that the government withheld from civilian counsel material in its possession. In the instant case, but unlike *DeChamplain*, the government here never relied upon any of the undisclosed documents as part of its case. Moreover, again unlike *DeChamplain*, the military defense counsel, the military judge, and the district court all explicitly

[13] Petitioner contends (Pet. 37) that his civilian counsel should have been provided a security clearance for this case, since he did receive a clearance for a later case. We observe that his civilian counsel informed the court-martial that, although neither he nor petitioner had security clearances (Tr. 57), "* * * if I am provided with a copy of the G-2 dossier, I want it known that I consider my duty to my client would require me to show him or let him know what I know about this case * * *."

determined that everything in the dossier that might be helpful to the defense had been turned over to the civilian defense counsel. Because of these pertinent differences, it is most unlikely that the instant case will be affected by the Court's decision in *DeChamplain*.[14]

b. Petitioner also claims that he was improperly denied access to other information in the government's possession. He argues (Pet. 39) that, although the government submitted questionnaires to 450 persons listed in his patient records, it turned over to the defense only the questionnaires of those 13 persons who were called as witnesses for the prosecution; he speculates that access to the undisclosed questionnaires might have helped him disprove the prosecution's charges under the General Articles. Cf. *Brady* v. *Maryland*, *supra*. But, as the district court observed (Pet. App. 11oa):

> the names of the persons to whom the questionnaires were sent were taken from the patient book at the Dermatology Clinic. There is no suggestion that petitioner did not have access to this book to make his own investigation. If petitioner did not make certain statements to others than the 13 witnesses produced at the court-martial, this certainly would not negate the fact that he made the statements to the 13 witnesses, or that the utterances were "public" and made to "divers" persons. It is not "evidence favorable to defendant."

[14] Petitioner's motions to expedite his case, to consolidate it with *McLucas* v. *DeChamplain* for oral argument, and to stay the mandate of the court of appeals pending disposition of his petition for certiorari, were denied on November 11, 1974.

c. Similarly, petitioner contends (Pet. 40) that the district court erred in refusing to grant his motion under Fed. R. Crim. P. 16 "for an order to permit counsel to inspect and copy all records, memoranda, and other writings, recordings or other electronic surveillance of [petitioner], his place of work or residence or any other place frequented by him." Petitioner acknowledges the government's representation that it obtained no information by electronic surveillance, but he suggests the possibility that, in view of the large number of people involved in the case, there might have been electronic surveillance of which government counsel are unaware. This claim is unsupported. We continue to be unaware of any information about petitioner that was obtained by such surveillance.[15]

d. In short, petitioner's contentions relating to discovery do not show any constitutional error. As this Court held in *United States* v. *Augenblick, supra,* 393 U.S. at 356, "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten * * * that the proceeding is more a spectacle * * * or trial by ordeal * * * than a disciplined contest." That was not the case here.

2. Petitioner contends (Pet. 60–62) that his conviction was sought for the purpose of silencing "unpopular ideas and individuals." As the Board of Re-

[15] The district court denied the motion for disclosure of such information, "without prejudice to renewal if and when it appears that the Government obtains information through eavesdropping" (Pet. App. 8oa).

view observed, however, *United States* v. *Levy*, 39 C.M.R. 672, 678: "[T]his allegation overlooks completely that the record is absolutely devoid of any evidence indicating or even suggesting an impure motive in the preferring or referring of the charges for trial except that [petitioner's] commanding officer was aware that he was undergoing a security-type investigation,[16] and that [petitioner's] guilt of the charges has now been firmly established at his court-martial."

There is also no merit to petitioner's claim (Pet. 60) that he was treated differently from another physician at Fort Jackson. Petitioner relies on an affidavit (in Exhibit C to his petition for *habeas corpus* and never presented to the military courts) which states that an unidentified source disclosed that an unnamed doctor at Fort Jackson declined to instruct Special Forces aidmen but was not punished.

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[16] Petitioner attempts to show (Pet. 7) that his security investigation was undertaken because of his civil rights activities during July 1965 in Newberry County, South Carolina, and that Agent West therefore began investigating him at that time. The record, however, indicates otherwise. Petitioner did not arrive at Fort Jackson until July 13, 1965, a few days after entering on active duty. On July 17, he began participating in a Negro voter registration canvass, and on July 19 a notation was made in his personnel file to determine whether a security investigation should be made (Pet. 7). There was no necessarily causal connection between these two latter events; security investigations for people entering on active duty who have not been cleared are a routine matter. We also observe that Agent West did not become a military intelligence agent at Fort Jackson until November 1965, and that he became aware of petitioner no earlier than the summer of 1966, when he was assigned to the case by his supervisor (App. 516–517, 1355).

There is no evidence that the unnamed doctor violated the General Articles by fostering discontent and insubordination. The wording in the affidavit indicates that the unnamed doctor did not disobey an order, but requested (successfully) to have it changed. This is insufficient to establish a claim of discrimination. In any event, a particular wrongdoer cannot escape prosecution and conviction simply because another offender is not prosecuted. See, *e.g.*, *Washington* v. *United States*, 401 F. 2d 915, 925 (C.A.D.C.); *Oyler* v. *Boyles*, 368 U.S. 448, 456.

3. Petitioner contends (Pet. 42–44) that the court martial erred in not allowing him to prove, as a defense to the specifications under Articles 133 and 134, the truth of some statements he made to enlisted personnel. The truth of the statements was not the issue, however, since, as the Board of Review observed (39 C.M.R. at 678), "aside from the nature of the utterances, the evil which is the offense is the intent and effect of the utterances (Article 134) and the disgrace and dishonor which they bring to the officer, individually as well as upon the office which he holds (Article 133)." See *Parker* v. *Levy*, *supra*, 417 U.S. 733. Most of the specifications (such as the speech calling upon Negroes not to serve) were deleterious to good order regardless of their "truth" or petitioner's reasons for making them. It is true, as petitioner claims, that the court of appeals found that one of petitioner's statements—"Special Forces are liars and thieves, killers of peasants, and murderers of women and children"—might not be within the examples for violations of the General Articles as

set forth in the *Manual for Courts-Martial*. But that does not explain why truth should be a defense to such a statement, if the statement produces the prohibited effect and is made with the prohibited intent. In any event, petitioner cannot reasonably argue that, if the prosecution had been limited to proof of his various other public statements, he might have escaped conviction.[17] Any error in declining to allow petitioner to prove the truth of this particular statement was, therefore, harmless.

4. Petitioner also contends (Pet. 45–46) that the district court erred in finding that his conduct created a "clear and present danger" of the harmful results alleged under the Article 134 specifications. He argues that his conviction, because obtained by a "clear and reasonable tendency" test, was invalid under the First Amendment.

To prove guilt under the Article 134 specification, the government had to prove beyond a reasonable doubt (App. 627–628) that petitioner's statements were designed to promote disloyalty and disaffection among the troops; that the statements were disloyal to the United States; that the statements had a clear and reasonable tendency to promote disloyalty and

[17] Petitioner also asks this Court to determine whether the refusal of the law officer to allow a war crimes defense (to the order charge) to be heard by the court-martial was a jurisdictional error (Pet. 43). As this Court stated in *Parker* v. *Levy*, *supra*, 417 U.S. at 761, the court of appeals correctly determined that the "war crimes" defense, while recognized under the UCMJ, had been resolved against petitioner on a factual basis by the court martial which convicted him. The issue is therefore beyond the scope of civilian review.

disaffection among the troops (actual success in indoctrinating a particular audience is not a required element of proof, *United States* v. *Batchelor*, 7 U.S.C.M.A. 354); and that petitioner's conduct was "directly and palpably" prejudicial to good order and discipline in the Armed Forces.[18] The "clear and reasonable tendency" test used here, when combined with these additional requirements, is sufficient to pass constitutional muster. See *Schenck* v. *United States*, 249 U.S. 47; *Dennis* v. *United States*, 341 U.S. 494. As this Court observed in *Parker* v. *Levy*, *supra*, 417 U.S. at 761, petitioner's "conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."

5. Contrary to petitioner's assertions (Pet. 47–51), he was not constitutionally entitled to a separate trial on the "order" charge (Article 90).

In military prosecutions all known charges should be joined at a single trial, with the exception that minor derelictions should not be joined with serious charges.[19] *Manual for Courts-Martial, 1951*, paras. 26*c*, 33*f*, 30*h*; *United States* v. *Batson*, 12 U.S.C.M.A. 48. Joinder was especially appropriate here; much of

[18] In defining what is "prejudicial to good order and discipline" (App. 629), the law officer required a finding that the statements presented a clear and present danger of creating disloyalty, disaffection, insubordination, refusal of orders, or mutiny among the troops.

[19] Indeed, truncation of prosecutions may constitute reversible error. *United States* v. *Thomas*, 17 U.S.C.M.A. 22.

the evidence used to support the charges under the General Articles related to the element of intent under the order charge (see, *e.g.*, Tr. 102–104). Separate trials would have resulted in unnecessary duplication of testimony—a significant inconvenience in view of the number of witnesses located great distances from the trial—and may have caused substantial prejudice to petitioner in accumulating prior admissible convictions while delaying final disposition of the case.[20] See *United States* v. *Thomas, supra,* 17 U.S.C.M.A. 22.

Petitioner's argument (Pet. 48) that testifying on a limited number of charges would have been an admission of guilt on the remaining charges is without merit. The President has prescribed for an accused in the armed forces a broad privilege—beyond the civilian privilege against self-incrimination—to limit his testimony to one or more charges. The purpose of this rule is to protect an accused against the predicament of which petitioner complains. *Manual for Courts-Martial,* 1951, para. 149*b*; *United States* v. *Lovig,* 15 U.S.C.M.A. 69. Had petitioner testified as to any charge in this case, the law officer would have instructed the court not to draw any inference from his silence on the remaining charges.[21]

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[20] Petitioner's sentence of confinement (three years at hard labor) was within the statutory maximum for each offense of which he was convicted. It is quite possible that separate trials and sentences would have resulted, cumulatively, in a more severe punishment than petitioner actually received.

[21] With regard to petitioner's contention (Pet. 47) that if he had testified in defense of the order charge he might have been able to prove the "impossibility" of his ability to comply,

Equally insubstantial is petitioner's claim (Pet. 49) that he was prejudiced by the evidence under Additional Charges II and III, which were dismissed. These charges, alleging further violations of the General Articles, involved a letter written by petitioner to an Army sergeant in Viet Nam. The court martial returned a finding of guilty of a lesser included offense as to these two charges by substituting the phrase "culpable negligence" for the "intent" requirement in both specifications. Prior to sentencing, these charges were dismissed by the law officer on motion of the government, on the ground that such findings were tantamount under the UCMJ to an acquittal on those charges. Petitioner produced no evidence of any improper motive in the preferral of Additional Charges II and III or their referral to trial. Moreover, the law officer, after dismissing the charges, instructed the court not to consider them in determining a sentence (App. 646–648).[22]

In light of these circumstances, petitioner has failed to show that the refusal to sever was an error of constitutional proportion. *United States* v. *Augenblick, supra.*

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we point to the observation of the Board of Review (39 C.M.R. at 676–677): "[T]here is no contest that the order was given, and that [petitioner] willfully and defiantly disobeyed that order. * * * [W]hen the order in question was given to him, he gave as a reason for his refusal *not* that he did not understand what was expected of him, but that he *could not ethically* comply."

[22] Petitioner asserts that there is a contradiction between the order charge, which involved his refusal to deal with Special Forces personnel, and the "speech" charges, which alleged that he spoke to "divers" personnel. The Article 90 charge, however, alleged that petitioner refused to train Special Forces personnel, not that he refused to speak to them.

6. Petitioner makes a broad-ranging attack (Pet. 52–59), based on the Fifth and Sixth Amendments, against military trial procedures in general and in this case. To the extent that his claims involve evaluations of the record here, they are beyond the scope of civilian review. *Burns* v. *Wilson, supra.* To the extent that petitioner is challenging the basic procedures used in the military justice system, we note that this Court has recently reiterated its "conclusion that military criminal proceedings are not basically unfair." *Gosa* v. *Mayden,* 413 U.S. 665, 681. Moreover, in balancing the rights of accused servicemen against the needs of the military, Congressional judgments are entitled to particular deference. *Parker* v. *Levy, supra,* 417 U.S. 733.

a. Petitioner contends (Pet. 52–57) that his constitutional right to trial by an impartial jury was violated because certain groups—including non-career personnel, enlisted men, officers who were not superior to him in rank, medical personnel, and women—were not represented on his court-martial panel. He also argues (Pet. 53) that the resulting prejudice was compounded by "command influence and the absolute discretion of the convening authority to appoint the 'best qualified' men to the panel." These contentions are without merit.

This Court has long held that servicemen are not entitled to trial by jury in the civilian sense. See, *e.g., Kahn* v. *Anderson,* 255 U.S. 1, 8; *Ex parte Quirin,* 317 U.S. 1, 40–41; *Whelchel* v. *McDonald,* 340 U.S. 122, 126–127; *O'Callahan* v. *Parker,* 395 U.S. 258, 263. See also *United States* v. *Greene,* 20 U.S.C.M.A. 232;

Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial,* 15 Catholic U.L. Rev. 171 (1966).

Petitioner has not demonstrated by evidence of record any purposeful discrimination on the part of the convening authority in the exercise of his statutory discretion in selecting court members. See *Whitus* v. *Georgia,* 385 U.S. 545. In this case the exclusion of the listed groups was not unfair; as the Board of Review observed (39 C.M.R. at 679, n. 5), "[t]he record does not establish that any female officers were available to act as court-members." Moreover, two important features of court-martial selection generally protect the accused's interests. An accused is not judged by his or her subordinates, and the court is composed of members who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." [23] Article 25(d) (1) and (2), 10 U.S.C. 825(d) (1) and (2). The first feature is sensible in a military hierarchy; the second feature is especially appropriate for a trial (such as petitioner's) involving purely military issues best understood by a panel with special expertise.[24] As this Court stated in *Gosa* v. *Mayden, supra,* 413 U.S. at 680–681, allegations of "command influence"

[23] There was never any evidence before the military courts indicating that all court members were "career" officers. Although *voir dire* was extensive (App. 322–323), petitioner did not ask the members if they were career officers.

[24] With respect to the exclusion of medical personnel, we note that members of the medical corps are generally utilized only for medical duties and therefore do not customarily serve on courts martial. *Manual for Courts Martial,* 1951, para. 4a; Army Regulation 40–1, para. 9*a*, June 1, 1965.

(which petitioner directed at the court-martial system in general rather than at any evidence of such influence in this case) do not establish a fundamental lack of integrity in the truth-determining process of courts-martial. See *Artis* v. *United States,* No. 247–73 (Ct. Cl., decided December 18, 1974). The record contains no evidence that the convening authority wrote efficiency reports on any of the members or that any member was concerned as to the effect of the verdict on his carrer. (The convening authority does not learn how individual court members voted. Article 51(a), UCMJ, 10 U.S.C. 851(a); *Manual for Courts-Martial,* 1951, App. 8a; 82). Indeed, petitioner did not even explore this area during *voir dire.* Contrary to petitioner's suggestion, it is pure speculation to assume that, merely because it thought that a trial was warranted, the convening authority would think ill of a court member who entertained a reasonable doubt of guilt after hearing all the evidence at the trial itself.[25]

[25] Significantly, petitioner challenged none of the court members, peremptorily or for cause. In view of the fact that senior members of the court undoubtedly had witnessed hundreds of challenges during their military careers, the assertion that such a tactic would have antagonized them is unpersuasive. Further, the use of a peremptory challenge did not present petitioner with a "grisly Hobson's choice" (Pet. 57). It is true, as petitioner points out, that one peremptory challenge would have reduced the number of votes required for conviction (two-thirds of the panel) from 7 of 10 (70%) to 6 of 9 (66⅔%). But a peremptory challenge combined with a successful challenge for cause would have created a situation in which 6 of 8 members (75%) must concur for a guilty verdict.

With respect to petitioner's suggestion that a unanimous verdict should be required for court-martial convictions, this

b. Petitioner also claims (Pet. 57) that the Article 32 investigating officer was subject to the command influence of the convening authority—an allegation that ignores the fact that a convening authority acting in good faith will want a full investigation and an independent recommendation from the investigating officer.[26] Petitioner's claim (Pet. 57–58) that the Article 32 investigation should have been open to the public is insubstantial and contradicts his argument that he was prejudiced by pretrial publicity (Pet. 59). A public Article 32 investigation, like a public grand jury investigation, could create a climate of prejudice that would damage the interests of both parties.

c. Another of petitioner's assertions (Pet. 58) is that the prosecutor plays a preferred role in a court-martial as "clerk, bailiff, district attorney, sheriff, *amicus,* custodian, and special investigator" (Pet. 28). The prosecutor, however, does not act as an *amicus* or special investigator. Moreover, it is unrealistic to suppose that the burdensome clerical duties of

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Court has recently denied certiorari in a case involving the same issue. *Hurt* v. *Britton* No. 73-1433, certiorari denied, January 13, 1975.

[26] See *Gosa* v. *Mayden*, *supra*, 413 U.S. at 681, n. 6: "There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art. 32 of the Code, 10 U.S.C. § 832, requires 'thorough and impartial investigation' prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence."

the prosecutor (Pet. 28–29) exalt that officer in the eyes of the court members or add special force to his urgings.

d. Petitioner contends (Pet. 58–59) that the role of the Staff Judge Advocate produces unfairness. Although it is true that the Staff Judge Advocate selects the military defender, there is no claim that either petitioner or his civilian counsel was dissatisfied with that choice in this case. Had they been dissatisfied, they could have sought different counsel. See Articles 32(b) and 38(b), 10 U.S.C. 832(b) and 838 (b). As a practical matter, having the Staff Judge Advocate select both the prosecutor and military defense counsel helps to ensure that both sides have counsel of equal skill and experience.[27]

7. The law officer did not abuse his discretion in refusing to grant petitioner's request for a change of venue (Pet. 59). Petitioner's examples (Pet. 30) of the "climate of prejudice" at Fort Jackson do not support his position. For example, the telephone threat to one of the court members (Tr. 2632–2633) was made *after* the findings (and before the sentence), when the court had already convicted petitioner as charged (Tr. 2618–2619). The threat could have come

[27] Contrary to petitioner's assertions (Pet. 58, n. 1), the Staff Judge Advocate's activities were not in violation of the requirements of the Code. The Board of Review found the record "completely barren of factual support" for this allegation. 39 C.M.R. at 679. See *United States* v. *Smith*, 13 U.S.C.M.A. 553. There is also no evidence in the record that the Staff Judge Advocate selected the court members in this case.

from outside the venue and indeed could have been made by a disgruntled supporter of petitioner.[28]

At the outset of the trial, petitioner conducted extensive *voir dire* (see App. 322–323) to make sure that each court member would be fair, impartial, and uninfluenced by public opinion, and petitioner accepted the panel without a single challenge. He cannot now complain that the panel was biased against him. See *United States* v. *Moran*, 236 F.2d 361 (C.A. 2), certiorari denied, 352 U.S. 909; *Allen* v. *United States*, 4 F.2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597; *United States* v. *Fairchild*, 435 F.2d 972 (C.A. 10).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[28] The witness stated that during the telephone call no mention was made of this case (Tr. 2632). The witness and the other court members indicated that the call would not affect their deliberations (Tr. 2634).

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